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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.A. 47/2017 & CrI.M(B) 1328/2017 (for regular bail)**

% *Date of Judgment: 22nd September, 2017*

NAEEM @ NAIMUDDIN Appellant

Through: Mr.K.Singhal, Advocate

versus

STATE NCT OF DELHI Respondent

Through: Ms.Radhika Kolluru, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

1. The present appeal has been preferred under Section 374 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') challenging the judgment dated 16.02.2013 passed by the learned Trial Court whereby the appellant Naeem alongwith other four co-accused have been convicted under Section 395 read with Section 397 of the Indian Penal Code (hereinafter referred to as 'IPC'). Challenge is also laid to the order on sentence dated 28.02.2013 whereby the appellant Naeem was sentenced to rigorous imprisonment for life for the offence punishable under Section 395 read with Section 397 of IPC.
2. At the outset, it would be necessary to mention that the appeals preferred by the other co-accused namely Mohd. Azad Alam, Mohd. Arif, Shahjad and Sarfaraz @ Sonu bearing No's CrI. A.629/2013,

888/2013, 1132/2013 and 418/2014 respectively were decided vide a separate judgment dated 01.09.2014 passed by a co-ordinate bench of this Court.

3. The case of the prosecution as noted by the Trial Court reads as under:

“2. The case of the prosecution in brief is that on 04.02.2011 on receipt of DD No.76B, SI Umesh Rana along with Ct. Manjeet reached at WZ 621, Gali No.2, Sri Nagar where the complainant Amarnath Gupta met him who produced one buttondar knife and informed that a robbery had been committed at his shop and Rs. 30-35 thousand were robbed and robbers left the knife at the spot. SI Umesh Rana prepared the sketch of knife, sealed and seized the same. SI Umesh Rana recorded the statement of Amarnath Gupta, prepared the rukka and got the FIR registered through Ct. Manjeet and Crime Team Official were also called at the spot who inspected the site and took photographs.

(3) The complainant Amarnath Gupta showed CCTV footages of various cameras installed in the shop to SI Umesh Rana of the time of the incident on which SI Umesh Rana directed Amarnath Gupta to preserve the CCTV footage about the commission of offence and directed him to prepare the CD of CCTV footage and handed over to him. Amarnath Gupta also produced one shawl used by the robbers which was seized by the SI Umesh Rana. The complainant Amarnath Gupta informed the IO / SI Umesh Rana that on 04.02.2011 at about 9.45 PM he was sitting on the counter of his shop with his servants Shyam Bahadur and Vijay Bahadur when one person entered his shop who was having a knife in his hand and had his face covered with a handkerchief who put a knife on his back and asked him to handover whatever he has. At the same time, another person entered in the shop who was having a shawl around his body and he attacked Vijay Bahadur and while first boy was keeping the knife on his back on which his servant Shyam Bahadur had caught hold that person and in this process Shyam Bahadur, that boy and he (complainant) fell on the ground when at the same time third boy entered the shop who was having a pistol in

his left hand and took out the cash from the Galla / cash box and went towards the outside and in this process his servant Vijay Bahadur had lifted a chair and threw the same on the back of those persons as a result of which some money also fell on ground but those boys finally succeeded in running away from the spot. Thereafter a call was made at 100 number.”

4. Charge under Sections 395/397/34 of IPC was framed against all the accused persons namely Mohd. Azad Alam, Shahzad, Naeem @ Naimuddin, Mohd. Arif and Sarfaraz @ Sonu. Additionally, a charge under Section 25 of Arms Act was also framed against the accused Sarfaraz @ Sonu. All the accused persons pleaded not guilty and claimed to be tried.
5. To bring home the guilt of the accused persons, the prosecution examined as many as 15 witnesses. The statement of the appellant Naeem was recorded under Section 313 of Cr.P.C. whereby it was stated that he was innocent and had been falsely implicated in the present case. He was lifted by the Police officials from the Rohini Court Complex while he went to attend the Court proceedings in some other matter. The appellant examined 3 witnesses in his defence.
6. Mr. K. Singhal, learned counsel appearing on behalf of the appellant Naeem submits that the impugned judgment passed by the Trial Court is based on surmises and conjectures. Learned counsel for the appellant further submits that he had instructions not to argue the matter on the conviction of the appellant Naeem and limits his argument to the sentence only. It was contended that the quantum of sentence awarded to the appellant Naeem under Section 395 read with Section 397 of IPC is completely disproportionate to the alleged offence having been

committed. The counsel further submits that the appellant Naeem was 26 years of age at the time of the commission of the offence. He has a family comprising of father, mother, two younger sisters and two younger brothers. The crime was committed when he was in the prime of his youth thus, there is a probability that the appellant Naeem can be reformed and rehabilitated and prays for the lesser sentence.

7. *Per contra*, Ms. Radhika Kolluru, learned APP for the State submits that there is no infirmity in the judgment and the order on sentence passed by the learned Trial Court.
8. Counsel for the State submits that the case of the prosecution is duly proved by the eye witnesses account of PW6, PW10 and PW11 who have given a vivid description as to how the incident took place. It is contended that the case of the prosecution has been duly proved by the visuals of the CCTV footage. Having regard to the evidence on record, the Trial Court has correctly analysed the evidence and convicted the appellant Naeem and the other co-accused.
9. Ms. Kolluru highlighted the fact that the other co-accused in the present case who were involved in the commission of the offence stand convicted vide a separate judgment dated 01.09.2014 passed by this Court.
10. We have heard the learned counsel for the parties, considered their rival submissions and given our thoughtful consideration to the matter.
11. At the outset, we deem it proper to analyse the testimony of the complainant Amar Nath who was examined as PW11 who deposed in his examination-in-chief that his son Manoj (PW5) was running a business of tobacco at WZ-621, Gali No.2, Shri Nagar, Rani Bagh and

he also used to sit at the same shop. On 04.02.2011 at about 9:45 PM, PW11 alongwith his servants Shyam Bahadur (PW10) and Vijay Bahadur (PW6) were present at the shop. PW11 further deposed that one person whose face was covered with handkerchief and was armed with a knife entered his shop. The person had put the knife on his back and asked him to handover the things in his possession. Subsequently, another person entered the shop whose body was covered with shawl and was also armed with a knife. Thereafter, the second boy attacked Vijay Bahadur (PW6) while the first boy kept the knife on his back. In the meantime, the other servant namely Shyam Bahadur (PW10) caught hold of one of the boys and in this process PW10, the boy and PW11 fell on the ground. It was further deposed by PW11 that at the same time, the third boy entered the shop who was armed with a pistol and took out cash from the cash box. In this process, Vijay Bahadur (PW6) lifted a chair and threw the same on the back of those persons as a result of which some money fell on the ground. All the boys fled away from the spot but the knife which was put on the back of PW11 and the shawl which was worn by the other person was left at the spot. Some public persons made a call at number 100. Police came to the spot and recorded his statement which was proved by him as Ex.PW11/A. The knife and the shawl was handed over to the Police which was seized vide memos Ex.PW11/B and Ex.PW7/B. PW11 correctly identified the two accused persons in the Trial Court but failed to name them. The Trial Court observed the names of the two accused persons as Sarfaraz and Naeem (the appellant herein). PW11 identified the appellant Naeem as the boy who kept a knife on him and co-accused Sarfaraz as the boy

who was having a shawl wrapped around him. PW11 also correctly identified the knife as the same which was left at the spot by the appellant Naeem and which was handed over by him to the Investigating Officer. The shawl which was handed over by him to the Investigating Officer was also correctly identified by him in the Trial Court.

12. In his cross-examination, PW11 failed to name the person who made the call at number 100. PW11 stated that he did not give any information to the Police regarding theft of rupees one lakh at the time when PCR call was made and had voluntarily explained that the said information was given to the Police after their arrival at the spot. PW11 further stated that the Police had reached the spot after 4-5 minutes after the call. Thereafter, the PCR officials left after about 5-7 minutes but the local police remained till late at night and carried out the necessary investigation. The statement of PW11 was recorded by the Police. PW11 did not sustain any injuries during the incident. The entire incident lasted for one to one and a half minute. The shawl was left by the assailants near the counter of his shop. The knife and the shawl were handed over by PW11 to the Police. It was observed by the learned Trial Court that PW11 in his statement Ex.PW11/A, he had only mentioned the fact regarding the robbery of the cash amount from the cash box, but not regarding some amount having fallen down while the boys were running away. It was admitted by PW11 that one incident of dacoity had already taken place in his shop in the year 2005. It was further admitted by PW11 that his family resides at the first floor of the shop.

13. The next eye witness relied upon by the prosecution was PW6 Vijay Bahadur who was working as a servant in the shop of PW11 on the fateful night of the incident. PW6 deposed in his examination-in-chief that he was working for the last ten years at the shop of PW11 Amar Nath who was running a business of wholesale of Tobacco products. On 04.02.2011, he alongwith Shyam Bahadur (PW10) and Amar Nath (PW11) were present at the shop. At about 9:45 PM, three boys came to the shop. Initially one boy entered inside the shop, who was carrying a knife. The said boy was followed by another boy who was having a shawl wrapped around him and subsequently the third boy followed them, who was armed with a pistol. The first boy put the knife on PW11 Amar Nath, the second boy who was wearing a shawl pointed the knife to him and PW10 Shyam Bahadur. When the third boy armed with a pistol entered the shop, they started raising an alarm, whereupon the shawl of the second boy slipped and fell down. PW6 recognised him after falling of his shawl and hit him with a chair which was kept in the shop. Thereafter, all the boys fled away from the shop. Learned APP for the State in the Trial Court sought permission to ask leading questions to PW6 whereby it was deposed by him that his statement was recorded by the Police at the shop. PW6 admitted that he had stated to the Police that the person who was carrying a pistol had removed the money from the cash box. PW6 further admitted that he told the Police that four boys had come to the spot and out of these two boys carried knives, one of whom had shown the knife to him and the other had shown the knife to PW10 Shyam Bahadur. The other boy armed with a *katta* was standing outside and was the one who came inside the shop at last and

removed the money from the cash box. PW6 clarified that earlier he had stated that three persons had entered the shop, as he could not see the fourth one who was standing outside the shop. It was further deposed by PW6 that he had informed the Police that out of the four boys, two boys had covered their faces with handkerchief. PW6 identified co-accused Shahjad in the TIP proceedings conducted at Tihar Jail. PW6 identified the appellant Naeem and other co-accused who were found present in the Trial Court.

14. In his cross-examination, the following question was put to PW6 with regard to the identification of the accused persons:

“Q: How could you identify the accused when their faces were covered?”

Ans: I could identify the accused because two boys had earlier come on the pretext of making some purchases and when these boys came later they were wearing the same clothes and one of the boys who had covered his face with the shawl, I could identify because during the altercation his shawl had fallen down.”

15. It was further stated by PW6 that the two accused had come about half an hour prior to the incident which took place around 9.45 PM. The accused had entered one by one in quick succession and not after any gap of time. PW6 denied the suggestion that there were no chairs in the shop and has voluntarily stated that he had hit one of the accused with a chair.
16. Another eye witness of the incident was PW10 Shyam Bahadur who was also working as a servant in the shop of PW11 Amar Nath. PW10 deposed in his examination-in-chief that on 04.02.2011 at about 9.45

PM, he along with PW11 Amarnath and PW6 Vijay Bahadur were present at the shop. PW10 further deposed that five persons had entered the shop, out of which one person entered with a knife and put it on the back of PW11 Amar Nath and asked him to handover the things in his possession. It was further deposed by PW10 that when he tried to apprehend that person, at the same time, another person came in the shop who was wrapped in a shawl and also armed with a knife caught PW6 Vijay Bahadur. PW10 further deposed that he made the first person lie on the ground and at the same time third person entered the shop who was armed with a *katta* and took out money from the cash box while the other two persons remained standing near the counter. PW6 Vijay Bahadur had thrown a chair towards those persons as a result of which some money fell on the ground and thereafter all the five persons fled away from the spot. The assailants left a knife and a shawl while they were fleeing away from the spot. PW10 identified all the assailants thrice i.e. *firstly*; at the shop, *secondly*; at the Police Station and *thirdly*; at the Trial Court. PW10 identified all the accused persons by pointing towards them in the Trial Court. The APP for the State sought permission to put leading questions to PW10 whereby it was deposed by him that it was PW6 Vijay Bahadur who was present at the shop and clarified that it was PW6 who lifted the chair and had thrown the same towards the accused persons as a result of which the two boys fell down.

17. The prosecution has been able to successfully establish that PW11 Amar Nath along with his son PW5 Manoj Kumar were running a business of wholesale of Tobacco products at WZ-621, Gali No.2, Shri

Nagar, Rani Bagh and Shyam Bahadur (PW10) and Vijay Bahadur (PW6) were employed in the said shop of PW11 Amar Nath. The four CCTV Cameras were installed at the shop out of which Camera 1 and 2 i.e. CH-1 & CH-2 were installed at the shop on the front portion of the building where the sale/purchase work was done and the camera 3 and 4 i.e. CH-3 & CH-4 were installed on the back portion of the building which was used as a godown.

18. In the present case, the prosecution has been able to successfully establish that the visuals retrieved from the CCTV footage recorded by all the cameras i.e. CH-1, CH-2, CH-3 and CH-4 confirm the involvement of the appellant Naeem alongwith other four co-accused persons namely Mohd. Azad Alam, Shahjad, Mohd. Arif and Sarfaraz @ Sonu and also confirm the use of knives and firearm during the incident. It is further evident from the visuals of the CCTV that the body language of the accused persons Mohd. Arif and Sarfaraz, including the appellant Naeem at the time of the incident was highly aggressive and fear provoking.
19. Reading the testimonies of the aforementioned witnesses alongwith the entire evidence available on record shows that there are no material contradictions which go to the root of the matter and their testimonies remain consistent on all material particulars. The prosecution has successfully proved its case against the appellant Naeem who entered the shop armed with a knife and his face was covered with a small handkerchief. The appellant Naeem put a knife on the back of PW11 Amar Nath and committed the charged offence with the other co-accused. The prosecution has been able to conclusively prove the guilt

of the appellant Naeem beyond reasonable doubt. We find no infirmity in the order of conviction passed by the learned Trial Court against the appellant Naeem.

20. The question which arises for our consideration is as to whether the learned Trial Court has awarded an adequate sentence to the appellant Naeem or is it excessive and harsh?
21. Prior to dealing with the argument with regard to the quantum of sentence awarded to the appellant Naeem is concerned, we deem it appropriate to revisit the law relating to sentencing in a criminal case.
22. The Hon'ble Supreme Court in the case of ***State of Uttar Pradesh. v. Sanjay Kumar***, reported at (2012) 8 SCC 537, discussed the need of sentencing policy for guiding the unfettered judicial discretion and lack of uniform and equal treatment of similarly situated convicts. The Court also discussed the principle of proportionality and the criminal background of the convict while determining the sentence of the accused. The relevant para 21 reads as under:

“21. Sentencing policy is a way to guide judicial discretion in accomplishing particular sentencing. Generally, two criteria, that is, the seriousness of the crime and the criminal history of the accused, are used to prescribe punishment. By introducing more uniformity and consistency into the sentencing process, the objective of the policy, is to make it easier to predict sentencing outcomes. Sentencing policies are needed to address concerns in relation to unfettered judicial discretion and lack of uniform and equal treatment of similarly situated convicts. The principle of proportionality, as followed in various judgments of this Court, prescribes that, the punishments should reflect the gravity of the offence and also the criminal background of the convict. Thus, the graver the offence and the longer the criminal record, the more severe is the punishment to be awarded. By laying emphasis on individualised justice, and shaping the

result of the crime to the circumstances of the offender and the needs of the victim and community, restorative justice eschews uniformity of sentencing. Undue sympathy to impose inadequate sentence would do more harm to the public system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats.”

(Emphasis Supplied)

23. In the case of ***State of M.P. v. Ghanshyam Singh***, reported at (2003) 8 SCC 13, the Apex Court listed various offences including the offence of Dacoity which has a great impact on the social order and public interest and require exemplary treatment. The Supreme Court also noted the rights of the victim of the crime and the society at large. The relevant paras 17 to 19 read as under:

“17. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic a view merely on account of lapse of time in respect of such offences will be result wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by a string of deterrence inbuilt in the sentencing system.

*18. In **Dhananjay Chatterjee v. State of W.B.**, (1994) 2 SCC 220, this Court has observed that a shockingly large number of criminals go unpunished, thereby increasingly encouraging the criminals and in the ultimate making justice suffer by weakening the system's credibility. The imposition of appropriate punishment is the manner in which the court responds to the society's cry for justice against the criminal. Justice demands*

that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.

19. Similar view has also been expressed in *Ravji v. State of Rajasthan* (1996) 2 SCC 175, It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should “respond to the society's cry for justice against the criminal”. If for the extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.”

(Emphasis Supplied)

24. We may note that a coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in the case of ***Arun Kumar Mishra vs. State*** reported at **2017 SCC Online Del 10815** and ***Ramjee Lal v. State (Govt. of NCT) Delhi*** reported at **241 (2017) DLT 290**, discussed the sentencing policy in detail.
25. As far as the sentence of the appellant Naeem is concerned, the following aggravating factors were relied upon by the learned Trial Court which read as under:

- i) The incident of dacoity was committed after sunset during night hours;
 - ii) The appellant Naeem had criminal antecedents and was declared as Bad Character (BC) of the area;
 - iii) Whenever the appellant Naeem was released on bail, he was invariably found involved in some other criminal case;
 - iv) The attack was made at the shop of PW11 Amar Nath who was a senior citizen of 71 years of age.
26. Thus, after consideration of the criminal antecedent of the appellant Naeem alongwith other aggravating circumstances enumerated hereinabove, the learned Trial Court has awarded a harsh and stern punishment of rigorous imprisonment for life under Section 395 read with Section 397 of IPC.
27. It is reflected from the order dated 24.07.2017 passed by this Court that the State has been directed to provide the current status of the cases pending against the appellant Naeem. The State has submitted a status report dated 20.09.2017 which was filed under the signature of the SHO Police Station Subhash Place. The relevant part reads as under:

S.No.	FIR No.	Police Station	Under Sections	Current Status of the case
1	36/2011	Saraswati Vihar	395/397/34 IPC & 25/27/54/59 Arms Act	Convicted
2	814/2006	Saraswati Vihar	457/511/34 IPC	Convicted and undergone
3	285/2007	Saraswati Vihar	25 Arms Act	Convicted and undergone
4	673/2006	Saraswati Vihar	25 Arms Act	Convicted and undergone

5	217/2005	Saraswati Vihar	379/411/34 IPC	Convicted and undergone
6	216/2008	Saraswati Vihar	457/380/411 IPC	Convicted and undergone
7	1094/2006	Saraswati Vihar	457/380/411 IPC	Convicted and undergone
8	06/2004	Saraswati Vihar	457/380 IPC	Convicted and undergone
9	248/2004	Jahangir Puri	411 IPC	Pending Trial
10	384/2003	Saraswati Vihar	379 IPC	Pending Trial
11	792/2006	Saraswati Vihar	379/34 IPC	Pending Trial
12	362/2007	Moti Nagar	457/380/411 IPC	Pending Trial
13	1127/2005	Saraswati Vihar	25/54/59 Arms Act	Pending Trial
14	285/2007	Parshant Vihar	25 Arms Act	Pending Trial
15	216/2006	Saraswati Vihar	25Arms Act	Pending Trial
16	1110/2006	Samai Pur Badli	399/402 IPC	Pending Trial
17	1096/2006	Ashok Vihar	457/511/34 IPC	Pending Trial
18	412/2007	Parshant Vihar	379/411/34 IPC	Pending Trial
19	1043/2007	Parshant Vihar	379/411 IPC	Pending Trial
20	160/2005	Parshant Vihar	379 IPC	Pending Trial
21	554/2007	South Rohini	379/411 IPC	Pending Trial
22	28/2005	Parshant Vihar	379 IPC	Pending Trial
23	428/2003	Parshant Vihar	379/411 IPC	Pending Trial
24	1094/2006	Parshant Vihar	457/380 IPC	Pending Trial
25	16/2005	Parshant Vihar	379 IPC	Pending Trial
26	217/2005	Parshant Vihar	379 IPC	Pending Trial
27	81/2008	Hauz Khas	392/34 IPC	Pending Trial

28	46/2008	Keshav Puram	379 IPC	Pending Trial
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28. Reading of the status report would show that the appellant Naeem is involved in 28 criminal cases filed at various Police Stations and under different Sections of IPC as enumerated above. Out of 28 cases, the appellant Naeem has been held guilty under 13 cases and a total of 6 cases were pending adjudication before the concerned Court. In this backdrop, on a conjoint reading of the eye witnesses account of PW6, PW10 and PW11, the aggravating circumstances relied by the learned Trial Court extracted in the foregoing para and the status report tendered by the learned counsel for the State that the appellant Naeem is a hard core criminal against whom various criminal cases are pending, we reach the inescapable conclusion that the appellant Naeem does not have clean antecedent. The submissions advanced by the learned counsel for the appellant Naeem are unfounded.
29. After consideration of all the aggravating factors noted by the Trial Court we find that the Trial Court imposed a sentence befitting the crime. It is the nature and gravity of the crime, and not the criminal, which are germane for consideration of the appropriate punishment in a criminal trial. Imposition of sentence without considering its impact on social order may be in reality, a futile exercise. The sentence imposed upon the accused must reflect public abhorrence of the crime.
30. Having regard to the nature of the offence and the manner in which it was executed or committed and the pendency of the criminal cases pending against him, we concur with the findings of the learned Trial

Court. Undue sympathy to the appellant Naeem will diminish the public confidence in the justice delivery system.

31. Applying the law laid down in the aforesaid judgments to the facts and circumstances of the present case, we find no infirmity in the order on sentence passed by the learned Trial Court. Accordingly, the appeal stands dismissed.
32. Copy of this judgment be sent to the concerned Jail Superintendent for updating the jail record.
33. Trial Court record be sent back along with a copy of this judgment.

Crl.M(B) No. 1328/2017

34. In view of the judgment passed, the bail application stands dismissed.

G.S.SISTANI, J.

CHANDER SHEKHAR, J.

SEPTEMBER 22, 2017

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